BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SCOTT W. STENULSON Claimant	)	
VS.	)	Docket No. 1,031,756
SEDGWICK COUNTY Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the March 25, 2008, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on June 20, 2008. Brian D. Pistotnik, of Wichita, Kansas, appeared for claimant. Dallas Rakestraw, of Wichita, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant did not suffer intervening accidents. The ALJ gave equal weight to the opinions of Dr. Pedro Murati, Dr. Chris Fevurly, and Dr. John Estivo and found that claimant had a 7.33 percent impairment of function to the body as a whole. Further, the ALJ found that claimant was entitled to a work disability. The ALJ concluded that claimant had a 41 percent task loss and a 100 percent wage loss, making a work disability of 70.5 percent.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent requests that the Board reverse the ALJ and find that claimant suffered an intervening accident or accidents and that its liability should, therefore, be limited to a 5 percent whole body award. Respondent further requests that the Board affirm the finding of the ALJ that claimant is not permanently totally disabled. Respondent further submits that the functional impairment rating of Dr. Estivo of 5 percent to the whole body is the most credible. Respondent also asserts that claimant is not entitled to a work disability. In the event the Board finds that claimant is entitled to a work disability, respondent argues that claimant did not make a good faith effort to find post-injury employment and should

not be entitled to a 100 percent wage loss but, instead, should have a wage imputed of $599.20 for a 20 percent wage loss. Additionally, respondent argues that the task loss opinion of Dr. Fevurly of 8.3 percent is the most credible.[1]

Claimant asserts that he is permanently totally disabled. In the event the Board does not find that he is permanently totally disabled, he contends he is entitled to a work disability of 91 percent based on a 100 percent wage loss and an 82 percent task loss. Claimant further contends that he did not suffer an intervening accident or accidents.

The issues for the Board's review are:

(1) Did claimant suffer an intervening accident or accidents?

(2) Is claimant permanently and totally disabled? If not:

(3) What is the nature and extent of claimant's functional disability?

(4) Is claimant entitled to a work disability? If so, did he show a good faith effort to find employment after his termination by respondent or should a post-injury wage be imputed to him?

FINDINGS OF FACT

Claimant began working for respondent in September 2000 doing custodial and maintenance work. He eventually became a full time maintenance worker. On July 18, 2006, claimant was stripping floors when he stepped in a puddle of stripper and slipped. He did the splits, and the pressure on his knees made them buckle. He caught himself before hitting the floor but felt something give in his back. He felt a stinging, burning sensation in his low back and pain in both knees, with the greater pain in the right knee.

Claimant worked one or two days after his accident and then was sent to Via Christi Occupational by respondent, where he was seen by Dr. Hughes. Claimant said he returned to work for one day on limited duty. But when he went to work the next Monday, July 24, he was told that respondent could not accommodate his restrictions, and he was sent home.

An MRI was performed on claimant on July 25 which showed disc desiccation at L4-5 and L5-S1. The MRI also revealed disc bulging, but there was no evidence of nerve root displacement or significant spinal stenosis.

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[1] During oral argument to the Board, respondent withdrew its assertion that the task list prepared by Jerry Hardin was not entered into evidence and the task loss opinion of Dr. Murati, which was based on the list prepared by Mr. Hardin, should therefore be disregarded.

Respondent then sent claimant to Dr. Bernard Poole, an orthopedic surgeon, for treatment. Dr. Poole testified that claimant told him that his original symptoms included a pulled muscle feeling in both legs, which was getting better. Claimant complained that he continued to have sudden, sharp pain in his right knee with popping sensations. He also complained of pain in his low back and numbness in the back of both legs from his knees to his toes.

Upon examination, Dr. Poole found that claimant had limited range of movement in the entire lumbar spine and multifocal tender areas. However, the tender areas were not consistently in the same location. Dr. Poole found guarding but no true spasm in claimant's lumbar spine. When claimant walked, he did so with a stiff lumbar spine, but he could walk on his toes and heels with no difficulty. Claimant complained of discomfort in the entire front of both of his thighs, but Dr. Poole only found a slight tenderness in the quadriceps tendons above the kneecaps on both sides. Claimant demonstrated excellent power in both legs. He performed repeated straight leg raises against resistance and repeated flexions of the knee without resistance. However, after performing those tests, Dr. Poole lightly touched his hand on the front of claimant's right knee, and claimant began to scream loudly.

Dr. Poole testified that the inconsistencies in claimant's complaints of tenderness raised doubts as to the validity of the complaints but did not necessarily mean that the complaints were completely false. However, he found claimant's reaction to the simple touch of the tip of his finger on the front of his knee to be "totally bizarre"[2] and lacked logical explanation.

Dr. Poole's diagnosis of claimant was acute back strain, degenerative disc disease at L4-L5, and lateral stenosis. He recommended treatment for claimant's back but none for the knees. Dr. Poole took claimant off work until his next appointment, but claimant did not return for follow up.

Claimant complained to respondent that Dr. Poole was too rough on him and requested that he be seen by a different physician. He was then seen by Dr. John Estivo, a board certified orthopedic surgeon. Dr. Estivo testified that claimant was referred to him by his family physician. He initially saw claimant on August 8, 2006. After examining him and reviewing the MRI, Dr. Estivo diagnosed him with lumbar spine strain and left sacroiliitis. He performed an injection into his left SI joint. Dr. Estivo recommended physical therapy and placed him on an anti-inflammatory medication. Claimant was given restrictions to avoid lifting more than 20 pounds and to limit his bending, twisting and stooping to no more than one/third of a full day.

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[2] Poole Depo. at 11.

Dr. Estivo next saw claimant on August 23, 2006. Claimant continued to have lumbar spine pain and some left SI joint pain. Dr. Estivo noted that claimant seemed to overreact with the slightest touch. Even touching his clothing and not making contact with his back would result in claimant's complaining of excruciating pain in his sacroiliac joints, which did not make sense to Dr. Estivo. In his notes of August 23, Dr. Estivo stated: "I am having trouble explaining his subjective complaints and objectively I am not finding anything that would explain the severity of his subjective complaints. I do feel that he is exaggerating his symptoms at this point. I think he does have a strain, but I think he is exaggerating his symptoms."[3]

Dr. Estivo kept claimant on physical therapy and next saw him on October 4, 2006. At that time, claimant was still having lumbar spine pain but denied leg pain or numbness or tingling or weakness to the lower extremities. Dr. Estivo noted that claimant had a cane but was carrying it rather than using it. He had no limp. Bilateral straight leg raising was negative and reflexes were normal, and he had a completely normal neurological examination. But he was still complaining of lumbar spine pain, so Dr. Estivo "gave him the benefit of the doubt"[4] and diagnosed him with a lumbar spine strain. He relaxed claimant's temporary restrictions after his review of claimant's entire record and his examination. He believed that a 40-pound lift limit was more reasonable than 20 pounds in terms of a permanent limitation. Claimant was to continue to limit bending, stooping and twisting to no more than one-third of a full workday. Dr. Estivo said that claimant is employable as long as his job tasks are within the permanent restrictions he has recommended.

Dr. Estivo rated claimant as being in DRE Category II, a 5 percent permanent partial impairment based on the AMA *Guides*.[5] Dr. Estivo checked claimant's knees in conjunction with his examination of his low back. He tested the strength and range of motion of the knees, and they were basically normal.

Dr. Estivo reviewed the task list prepared by Jerry Hardin. Of the 72 unduplicated items on the list, he opined that claimant is unable to perform 42 for a task loss of 58 percent. Dr. Estivo likewise reviewed the task list prepared by Dan Zumalt. Of the 98 unduplicated items on the list, he believed that claimant was unable to perform 36 for a task loss of 37 percent. However, when claimant reviewed the task list prepared by Mr. Zumalt, he believed that eight tasks on the list were inaccurately portrayed and were actually physically heavier work or required heavier lifting than set out on the list. Dr. Estivo had already opined that claimant was unable to perform three of those eight tasks. If the

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[3] Estivo Depo., Ex. 2 at 8.

[4] Estivo Depo. at 9-10.

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

remaining 5 tasks were added to the 36 tasks Dr. Estivo had already found claimant was unable to perform, Dr. Estivo's task loss would increase to 42 percent.

Claimant testified that at one point during the period of time he was being treated by Dr. Estivo, he had been drinking at home, became intoxicated, fell, and was taken to the hospital by ambulance. Claimant testified that Dr. Estivo had him on a highly addictive medication and he was reluctant to ask for a refill because he was afraid of becoming addicted. He then attempted to self-medicate by drinking alcohol to alleviate his pain. He testified that the ambulance ride to the hospital was quite rough because all the streets between his home and the hospital were under construction. He was strapped to a back board, and every time the ambulance hit a bump, he would cry out in pain.

After claimant was released from treatment by Dr. Estivo, he contacted respondent about returning to work. He testified that he was terminated by respondent at that time because it was unable to accommodate his restrictions.

Dr. Pedro Murati, a board certified independent medical examiner who is also certified in electrodiagnostic medicine and physical medicine and rehabilitation, examined claimant on November 28, 2006, at the request of claimant's attorney. Claimant's chief complaints were low back pain radiating into his left leg and occasionally down into his right leg, and bilateral knee pain, right greater than left. Dr. Murati obtained a history of claimant's accident and reviewed his medical records.

Upon examination, Dr. Murati found claimant's reflexes showed a depressed left hamstring, which is radiculopathic in nature. He had a weak left toe, which was also consistent with radiculopathy. Straight leg raising on the left was positive at 30 degrees, which was another positive sign of radiculopathy. Except for the flip sign, Waddell's signs were negative. Left sacroiliac testing was positive for sacroiliac joint dysfunction. Claimant had increased tone and tenderness on the paraspinals at L5 bilaterally. Claimant's knee examination showed positive creptius bilaterally and a positive McMurray's and patellar compression testing on the right.

After examining claimant, Dr. Murati diagnosed him with low back pain with signs and symptoms of radiculopathy and right patellofemoral syndrome. Dr. Murati said that the MRI showed a condition that would cause radiculopathy. Based on the AMA *Guides*, he placed claimant in DRE Lumbosacral Category III, which resulted in a 10 percent permanent partial impairment to the body as a whole. Dr. Murati's report did not provide an impairment rating for claimant's right knee, which he said was an oversight on his part. Dr. Murati testified that claimant would have a 2 percent whole person impairment for his right knee, which would combine with the 10 percent lumbosacral rating for a 12 percent permanent partial impairment to the body as a whole.

Dr. Murati gave claimant restrictions of no squatting, crawling, kneeling, and using repetitive foot controls with the right. He recommended that claimant lift, carry, push, pull

no greater than 20 pounds occasionally and 10 pounds frequently. Claimant should rarely bend, crouch, stoop, or climb stairs and ladders. He could occasionally sit, stand, walk and drive and should alternate sitting, standing and walking. Claimant should not lift below knuckle height. Dr. Murati reviewed the task list prepared by Jerry Hardin. Of the 72 unduplicated tasks on that list, he opined that claimant is unable to perform 59 for a task loss of 82 percent.

Dr. Murati said that if there had been substantial repercussions from claimant's post-injury falls, he would have had to obtain treatment. He also said that if claimant was treating his pain with alcohol because he had no access to pain medication, that fall would have been work-related. Concerning his second fall, Dr. Murati said if he had a spasm at home and that is why he fell, that also would be work related.

Dr. Chris Fevurly, who is a board certified independent medical examiner and is also certified in preventative medicine and internal medicine, examined claimant on June 15, 2007, at the request of respondent. He took a history from claimant and reviewed his medical records. Claimant complained to him of recurrent spasm in his low back that occurred about two to three times a month which occurred primarily when he is lying down and hurts for a few minutes at a time. He also complained of constant low back pain which he rated at a three. Claimant said he had trouble transferring from supine to sitting and sitting to standing. He had sporadic left posterior leg pain, which he described as a numbing sensation, that occurred three to four times a week and lasted from one to three hours at a time. Claimant also complained of bilateral knee pain, right greater than left.

Claimant reported a history of a anxiety and depression. He admitted he has had problems with alcohol dependency. He drinks one-half pint of hard liquor every day or every other day, with an accompanying quart of beer. He is on Lortab and Baclofen. Claimant told Dr. Fevurly that he tried to do home exercises and uses a bicycle to get around.

Upon examination, Dr. Fevurly noted that claimant was ambulating with the help of a four-point quad cane. In the standing neutral position, claimant's cervical, thoracic and lumbar curves were well maintained. Claimant had mild loss of normal lumbar lordosis. His pelvis was level and leg length was symmetric. Claimant struggled with performance of toe and heel walk, but motor strength to plantar and dorsiflexion was fully intact. His sensory examination was normal throughout the upper and lower extremities. There may have been a mild diminishment in soft touch over the dorsum of the left foot, which could be consistent with an L5 radiculopathy, but this was inconsistently demonstrated. Calf circumference was symmetric. Knee and ankle jerks were symmetric. Examination of claimant's knee revealed no loss of range of motion and no excessive crepitation. There was no joint line tenderness and no instability to anterior drawer sign or valgus/varus stress.

Claimant demonstrated hyperreactivity to light palpation throughout the lumbar area. Range of motion in the lumbar spine was limited with forward bend to only 30 degrees and extension at 30 degrees. However, claimant inconsistently demonstrated this loss of range of motion. Claimant could only bend to 30 degrees, but when Dr. Fevurly asked him to dress, he was able to bend to a significantly higher degree. He was also able to sit in a chair and bend over and put on his shoes and socks with no apparent problem.

Dr. Fevurly diagnosed claimant with chronic low back pain without evidence of radiculopathy. He had two-level mild degenerative disc disease with no evidence of spinal stenosis or lumbar radiculopathy. Dr. Fevurly also diagnosed claimant with bilateral knee patellofemoral syndrome. He said that claimant showed moderate-to-severe symptom magnification. He opined that claimant's work-related injury resulted in acute regional low back pain with nonspecific lower extremity complaints. The initial injury was consistent with an acute sprain/strain. He opined that claimant's degenerative changes were likely preexisting and were the natural consequence of living and aging. He found no evidence of ratable impairment of claimant's knees. He opined that claimant was at MMI.

Based on the AMA *Guides*, Dr. Fevurly placed claimant in the diagnosis related estimate (DRE) Lumbosacral Category II, resulting in a 5 percent whole person impairment. He could find no objective evidence for radiculopathy, which is what it would have taken to have rated claimant with a 10 percent permanent partial impairment.

Dr. Fevurly recommended that claimant avoid heavy lifting of greater than 70 pounds and occasional lifting greater than 55 pounds. Claimant should also avoid repetitive bending and stooping. Dr. Fevurly based these restrictions on his objective findings, stating that subjective complaints are not reliable in regard to making recommendations for permanent restrictions. Dr. Fevurly reviewed the task list prepared by Dan Zumalt. Of the 98 tasks on that list, claimant is unable to perform 8 for a task loss of 8 percent. If the 8 tasks on Mr. Zumalt's list claimant testified were incorrect were added to the 8 Dr. Fevurly found claimant was unable to perform, his task loss opinion would increase to 16 percent.

Regarding claimant's future medical needs, Dr. Fevurly believed there was no expectation or indication for further medical intervention or chronic medication by prescription. Dr. Fevurly said it was unlikely that surgery would improve claimant's current clinical complaints.

Claimant began looking for work immediately after he was terminated by respondent in October 2006. By the date of the regular hearing, he had contacted approximately 150 employers in an effort to find employment. He tried to make three to five contacts per week. He said he would fill out an application and then show the prospective employer the paperwork showing his permanent restrictions. He continued his search for work after the regular hearing, increasing his contacts by another 90 potential employers. Claimant was incarcerated for a 36-day period about July 2007 for DUI. He gets around now by walking

or using a bicycle because he lost his driver's license after being convicted of the DUI. The farthest he can walk is about 20 city blocks. He can ride his bicycle from Grove to the downtown area and back, if his back is up to it.

Mr. Jerry Hardin, a human resource consultant, met with claimant on January 22, 2007. Claimant told Mr. Hardin that he finished high school and went to Highland Community College for one semester. He attended Wichita Area Vo-Tech in 1981 to 1982 and studied HVAC, but he did not complete the course. He went back to Wichita Area Vo-Tech in 1990 through 1994 and studied apartment maintenance. He did not complete that course either. But he does have a good knowledge of construction and general maintenance. In going back over claimant's employment history, claimant told Mr. Hardin he had worked as a custodian, trash collector, heavy equipment operator/truck driver, a router, a burrer, and a maintenance lead supervisor.

Mr. Hardin analyzed the restrictions of Dr. Murati and compared it to claimant's education, training and work history. In doing so, he stated that based on Dr. Murati's restrictions, he did not know of any job that claimant could perform and he would find claimant to be permanently totally disabled. Mr. Hardin said that it took claimant a long time to get from the reception area to his office, and he had a cane to help him walk. He came across as being very much in pain and unable to sit or stand for very long. He changed positions quite often during the interview.

Based on Dr. Estivo restrictions, claimant would be able to go back to driving trucks and heavy equipment, perform light production work, and do retail sales. There would be jobs he could do and still earn $400 to $450 per week. A job as a bench assembler would start at just under $500 per week. However, potential employers would still look at claimant's personal history of arrests and his dishonorable discharge from the Army because of drugs.

Dan Zumalt, a vocational rehabilitation counsel, was scheduled to meet with claimant at the request of respondent. After having to reschedule twice because claimant did not appear, the interview was finally held on August 23, 2007. Claimant arrived at that appointment but had not completed the work and educational history form, and Mr. Zumalt was unable to complete the interview in the time scheduled for the appointment. After claimant was again unavailable for the first scheduled follow-up, the interview was completed on September 27, 2007.

With information from claimant, Mr. Zumalt prepared a list of 96[6] tasks that claimant performed in the 15 year period before his work injury of July 18, 2006. Claimant was very straightforward and forthcoming in helping Mr. Zumalt to identify the tasks he performed.

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[6] Although Mr. Zumalt testified to 96 unduplicated task lists, a count of the list shows there were 98 unduplicated tasks.

After interviewing claimant and determining his transferable skills, Mr. Zumalt opined that claimant could work as an assembler of small products. The average of the median and mean for the hourly wage for those positions was $13.52. The minimum of fringe benefits would have been $1.46. This would compute to an average weekly wage of $540.80 in wages and $58.40 in fringe benefits, for an average weekly wage of $599.20.

The job of small products assembly is the only post-injury employment Mr. Zumalt mentioned in his report, and he felt it was the most appropriate job for claimant and had the most openings in the community. Mr. Zumalt was not hired to assist claimant in finding work and did not perform a labor market survey.

Mr. Zumalt did not send a copy of his report to claimant for his review. As Mr. Zumalt and claimant went through the tasks, Mr. Zumalt would parrot back verbally what he was told to be sure it was recorded according to the information given him by the claimant. Mr. Zumalt testified that he believed he was able to obtain information from claimant that was accurate concerning his employment background and essential job tasks. He also did an employer verification.

Claimant's deposition was taken on November 30, 2007, at which time he said his condition was "[w]orse than . . . when I had my original injury." He had pain more often, and the pain was more severe. He said it had been a steady progression of worsening.

Claimant testified that he is capable of performing work to a limited degree but would need to be retrained in the correct field. He continues to use a cane for ambulating. Depending on the day, he starts feeling discomfort after sitting for a couple of hours and then he has to move around or change his position. Getting up to standing is a problem. If he makes a sudden turn while walking, he gets a sharp, shooting pain in his lower back. He can only stand for about 30 minutes to an hour before his discomfort increases. He said that in January 2008, he was to start a program at Wichita Vo-Tech studying computers.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[7]

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and actual wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based upon all the evidence, including expert testimony, concerning the capacity to earn wages.[8]

Despite clear signals from recent decisions of the Kansas Supreme Court that the literal language of the statutes should be applied and followed whenever possible, there has yet to be a specific repudiation of the good faith requirement by the Supreme Court. Absent an appellate court decision overturning *Copeland*[9] and its progeny, the Board is compelled by the doctrine of *stare decisis* to follow those precedents. Consequently, the Board must look to whether claimant demonstrated a good faith effort post injury to find appropriate employment.

ANALYSIS

The Board finds that the ALJ made an error in her calculation of claimant's task loss. She concluded that the average of Dr. Estivo's and Dr. Fevurly's task loss opinions was 12.5 percent. Actually, the average of Dr. Fevurly's opinions was 12.5 percent. The

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[7] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[8] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, Syl. ¶ 7, 944 P.2d 179 (1997).

average of Dr. Estivo's 35 percent and 41 percent is 38 percent. When Dr. Estivo's 38 percent opinion is averaged with Dr. Fevurly's 12.5 percent opinion, the result is 25.25 percent, not 12.5 percent as found by the ALJ. Furthermore, the Board finds that Dr. Estivo's opinions were actually 37 percent (36 tasks lost out of 98) and 42 percent (41 tasks lost out of 98) for an average of 39.5 percent. Likewise, Dr. Fevurly's opinions would be 8 percent (8 tasks lost out of 98) and 16 percent (16 tasks lost out of 98) for an average of 12 percent. When this 39.5 percent is averaged with the 12 percent, the average of Drs. Estivo's and Fevurly's opinions using Mr. Zumalt's task list becomes 25.75 percent.

When this 25.75 percent average is averaged with the 70 percent task loss opinions of Drs. Murati and Estivo using Mr. Hardin's task list, the combined average of the various task loss opinions is 48 percent, not the 41 percent that the ALJ found it to be. When this 48 percent task loss is averaged with the 100 percent wage loss, claimant's work disability is 74 percent rather than the 70.5 percent found by the ALJ.

The Board otherwise agrees with and adopts the findings, conclusions and orders of the ALJ. It is not necessary to repeat them here.

CONCLUSION

(1) Claimant did not suffer an intervening accident. His fall at home before the October 4, 2006, appointment with Dr. Estivo resulted in only a temporary exacerbation of his symptoms. As for his subsequent exacerbation of symptoms during his incarceration in July and August of 2007, there is no proof of any accident or injury occurring during this period of time.

(2) Claimant is capable of performing substantial, gainful employment and is not permanently and totally disabled.

(3) Based upon the medical opinions of Drs. Estivo, Murati and Fevurly, claimant sustained a 7.33 percent permanent impairment of function as a direct result of his work-related injury.

(4) As of the close of evidence, claimant was continuing to make a good faith job search effort post-injury and, therefore, is entitled to a work disability award based upon his actual post-injury earnings averaged together with his task loss. Claimant has suffered a 48 percent task loss and a 100 percent wage loss. He is entitled to a 74 percent permanent partial disability award.[10]

[10] The parties agree that claimant would not be entitled to a work disability during his period of incarceration but would, instead, be limited to his percentage of functional impairment. But the parties acknowledge that this would make no difference in the ultimate award. Therefore, this change will be omitted from the permanent partial disability calculation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 25, 2008, is modified as follows:

Claimant is entitled to 34 weeks of temporary total disability compensation at the rate of $483 per week or $16,422, followed by permanent partial disability compensation at the rate of $483 per week not to exceed $100,000, for a 74 percent work disability.

As of June 30, 2008, there would be due and owing to the claimant 34 weeks of temporary total disability compensation at the rate of $483 per week in the sum of $16,422 plus 67.86 weeks of permanent partial disability compensation at the rate of $483 per week in the sum of $32,776.38, for a total due and owing of $49,198.38, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $50,801.62 shall be paid at the rate of $483 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of June, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Robert G. Martin, Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge